the power to pardon and the power to define and regulate the punishment of crime. The latter is lodged in the legislature and by virtue of it that body may leave to the discretion of the trial court the determination of the quantum of punishment in any particular case. It would seem to follow that the legislature is also competent to authorize the courts to suspend sentence under certain circumstances, that is, practically to provide that in such cases no punishment at all shall be imposed.[6] Furthermore, there is still another difference between suspension of sentence and pardon. The former is merely a matter of procedure whereby the judgment of the court is postponed and the case held in abeyance. It leaves the conviction and the liability following it and all civil disabilities as they are to take effect upon the rendition of the judgment whereas a pardon not only relieves the punishment but also cancels the liability and restores civil rights.[7]

While the validity of a statute authorizing the suspension of sentence may thus be sustained, a different question is presented when legislative enactment confers on the court the power to stay indefinitely the execution of a sentence after it has been pronounced. Such a law cannot be upheld as an exercise of the legislative power to fix punishment, nor as an incident to the judicial power to regulate trial procedure, for both of these are exhausted when judgment, the pronouncement of the penalty and the final judicial act in the trial of a case, is rendered. It is difficult to escape from the contention that an indefinite stay of execution of a sentence is a relieving of punishment and an exercise of the pardoning power, and it has been generally so held in the cases in which the point has been raised.[8]

G. C. D.

EVIDENCE: HEARSAY: DECLARATIONS CONCERNING MENTAL STATE: INTENTION.—Where A's intention to do an act is introduced to prove that he did it, on what grounds are his declarations of this intention admissible? Two decisions raise this interesting question. In *Benjamin v. B'Nai B'rith Society*[1] to prove the death of the decedent at a certain time, declarations of his intent to

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[6] 8 R. C. L. 247.

[7] People v. Court of Sessions (1894), 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

[8] State v. Sturgis (1912), 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443; In re Webb (1895), 89 Wis. 354, 62 N. W. 177; Wall v. Jones (1910), 135 Ga. 425, 69 S. E. 548; State v. Smith (1910), 173 Ind. 388, 90 N. E. 607; Spencer v. State (1911), 125 Tenn. 64, 140 S. W. 597. But contra, Weber v. State (1898), 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472; Belden v. Hugo (1914), 88 Conn. 500, 91 Atl. 369, in which a statute conferring on the court the power to stay the execution of sentence was held to be constitutional. Compare § 1203 of Cal. Pen. Code.

[1] (Oct. 27, 1915), 50 Cal. Dec. 443, 447, 152 Pac. 731. The conclusion is based entirely upon the earlier case of Rogers v. Manhattan Ins. Co. (1903), 138 Cal. 283, 71 Pac. 348.

commit suicide were admitted on the ground that they were part of the *res gestae*. In *People v. Tugwell*[2] the defendant was on trial for murder. In proof of the defense that the deceased died by her own act, declarations of her intention to commit suicide were admitted under a recognized exception to the hearsay rule. The law in California seems settled in accord with the two instant cases. Thus, when a person's intention is offered to prove that he did what he declared he intended to do, his declarations declaring such intention, or naturally tending to prove its existence, are admissible as part "of the *res gestae* as to intent."[3] Where, however, the disputed fact is death by homicidal agency, as in the Tugwell case, then such declarations are admissible, not as *res gestae,* but under an exception to the hearsay rule admitting declarations concerning the mental state.[4]

It is submitted that the ground of admissibility should be the same in both cases, for upon principle they seem in no way distinguishable. In each the mental state, i. e. intention, is a distinct relevant fact. The evidence of these declarations is introduced primarily, not to prove the fact of death, but to prove the existence of an intention from which the ultimate fact is circumstantially inferred.[5] The authorities, generally, approve the use of this intention to prove that the act intended was done,[6] but there is much divergence of opinion as to what the ground of admissibility is in regard to these declarations offered in proof of the intention. One writer would admit them if made spontaneously, on the ground, that because of their spontaneity, they are not hearsay, but, like conduct, manifestations of intention from which its existence is circumstantially inferred.[7] The better view, and that most consistent with the nature of the evidence, is to regard these declarations as hearsay. They are direct assertions of a fact, and thus, intended to express a thought, possess that assertive quality which characterizes them as hearsay.[8] Therefore, to be admissible

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[2] (Sept. 8, 1915), 21 Cal. App. Dec. 325, 152 Pac. 740.

[3] Benjamin v. B'Nai Brith Society, supra n. 1; Rogers v. Manhattan Ins. Co., supra n. 1. Cf. Jenkin v. Pacific Mut. Ins. Co. (1900), 131 Cal. 121, 63 Pac. 180, where such evidence was excluded without comment. The later Rogers case does not notice it, and the Benjamin case suggests the exclusion to have been on the ground that the declarations were too remote; but they were made an indefinite number of days before. The decision is difficult to reconcile with the later cases.

[4] People v. Tugwell, supra n. 2. As to the relevancy of this evidence, see People v. Wilson (1910), 14 Cal. App. 515, 112 Pac. 579; I Wigmore, Evidence, § 143.

[5] Rogers v. Manhattan Ins. Co. (1903), 138 Cal. 285, 293, 71 Pac. 348; State v. Beeson (1912), 155 Iowa, 355, 136 N. W. 317, Ann. Cas. 1914-D, 1275; I Wigmore, § 102.

[6] 1 Wigmore, §§ 102, 103.

[7] Chamberlayne, Modern Law of Evidence, §§ 2643, 2646, 2654; Commonwealth v. Trefethan (1892), 137 Mass. 180, 188, 31 N. E. 964.

[8] 3 Wigmore, § 1715; 26 Harvard Law Review, 146, 148.

some exception to the hearsay rule must be invoked. To require, as does the Benjamin case, that these declarations must accompany and explain some material act—that is, be part of the *res gestae,* seems untenable. Since they refer solely to the intention of the declarant and do not accompany the act of death or disappearance, it is difficult to perceive just what act they do accompany and explain. Consequently they appear to be improperly included under this *res gestae* exception to the hearsay rule.[9] Indeed this indefinite and ambiguous requirement, that these declarations be part of the "*res gestae* as to intent," seems inconsistent with other rulings of our courts. Thus, a recent decision held, with unjustifiable strictness, that declarations made by the decedent within two minutes of the shooting were not sufficiently contemporaneous to be admissible as explaining or characterizing that act.[10] So, also, statements of present pain have been confined to inarticulate groans.[11]

These statements concerning intention do, however, come within the scope of a recognized hearsay exception, and it was on this ground that the Tugwell case admitted the evidence. This exception makes declarations concerning a present existing mental state admissible as proof of it, when made in a natural manner, free from circumstances of suspicion.[12] It exists by reason of the fact that there is no direct means of proving the mental state except by these assertions.[13] There is no *res gestae* requirement, nor is its application confined, as in the Tugwell case, to situations where the disputed fact is death by homicidal agency.[14] The absence of spontaneity and remoteness in point of time from the fact sought to be proved (except as regards materiality) are questions of weight, not admissibility.[15] However in proving that A did an act or went to a certain place, his intention alone may be offered in proof of this fact. To allow the use of A's (mental state) belief that he had gone to the place or had done the disputed fact would amount to a complete abrogation of the

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[9] 3 Wigmore, §§ 1715, 1726; 4 Chamberlayne, § 2644; State v. Hayward (1895), 62 Minn. 474, 65 N. W. 63. Contra Foster v. Shephard (1913), 258 Ill. 164, 101 N. E. 411; but see 8 Illinois Law Review, 205.

[10] People v. Murphy (Nov. 3, 1915), 21 Cal. App. Dec. 615.

[11] Green v. Pacific Lumber Co. (1900), 130 Cal. 435, 62 Pac. 747; 2 California Law Review, 243.

[12] 3 Wigmore, §§ 1714, 1715, 1725; Mutual Life Ins. Co. v. Hillmon (1892), 145 U. S. 285, 36 L. Ed. 706, 12 Sup. Ct. Rep. 909; Commonwealth v. Trefethan, supra n. 7; cases collected in 5 Wigmore, 2d. ed. Supplement, § 1725, n. 1. Contra Throckmorton v. Holt (1901), 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. Rep. 474; Siebert v. People (1892), 143 Ill. 571, 32 N. E. 431.

[13] 3 Wigmore, § 1714.

[14] 3 Wigmore, § 1725.

[15] On the matter of remoteness, see State v. Kelly (1904), 77 Conn. 266, 58 Atl. 705; Blackburn v. State (1872), 23 Ohio St. 146. Cf. Jenkin v. Manhattan Ins. Co., supra n. 1.

hearsay rule, for the declarations would not be taken as proof of the existence of the mental state but as direct evidence of the fact in issue.[16]

Although the law seems settled in California, it seems that the more logical view, and the one most conducive to clearness of thought and application, is that which regards these declarations, not as part of the *res gestae* as to intent nor as primary evidence of the mental state, but as hearsay, admissible under the exception receiving statements of an existing mental condition.

R. C. F.

EVIDENCE: PRESUMPTION OF TIME OF DEATH FROM SEVEN YEARS' ABSENCE.—In *Benjamin v. Independent Order B'Nai B'rith Society*,[1] the defendant tried to impale the plaintiff on the horns of a dilemma. The plaintiff brought the action as beneficiary under an insurance certificate issued to her husband and payable on satisfactory evidence of his death. The insured disappeared after writing a letter stating an intention to commit suicide. There were, however, circumstances raising a doubt as to whether such was the insured's real intention. The plaintiff might at once have presented the proofs, unsatisfactory as they were, or might have continued to pay the premiums until the lapse of seven years brought into operation the code presumption that a person not heard from in seven years is dead.[2] It can hardly be said, however, that as a matter of law the plaintiff was required to present unsatisfactory proofs which would probably have been rejected, nor was it incumbent on her to pay dues if, as a matter of fact, the insured was dead, whether the proof of death was available or not. The plaintiff adopted neither of the above alternatives, but waited over seven years to raise the presumption of death. The defendant then tendered the dilemma. If death took place at the beginning of the seven year period the action is barred by the statute of limitations. If death took place at the end of the seven year period, in other words, if life must be presumed to exist until the presumption of death arises, the certificate was forfeited for non-payment of dues.

The court rescued the plaintiff from the dilemma by holding that while the proof of death was not satisfactory until the end of seven years, and therefore no right of action accrued before the end of that period, the time of death, when once the fact was established by virtue of the presumption, might well be found to have been at the beginning of the period, so that there was no

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[16] This "is not a statement of something passing through his mind at the time, it is simply a statement of fact within his knowledge,"—Mellish, L. J., regarding declarations as to the contents and execution of a will. Sugden v. St. Leonards (1876), 1 Prob. Div. 154, 251.

[1] (Oct. 27, 1915), 50 Cal. Dec. 443, 152 Pac. 731; supra, p. 145.

[2] Cal. Code Civ. Proc., § 1963, subd. 26.